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No. 00-46

IN THE

Supreme Court of the United States

NOV 13 2000

BRUCE G. MURPHY,

Petitioner,

v.

JEFFREY H. BECK,
as Successor Agent for Southeast Bank, N.A.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The federal common-law *D'Oench* doctrine, as expanded by the progeny of *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942), generally provides federal banking insurers, receivers of failed financial institutions, and their successors-in-interest sweeping protection against unrecorded agreements that might form the basis of a claim or defense. There is a broad and well-recognized circuit split over whether this federal common-law doctrine is viable in light of this Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997).

The question presented in this case is:

Whether the federal common-law *D'Oench* doctrine constitutes a valid bar to petitioner's claims?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff-appellant below, and petitioner in this court, is Bruce G. Murphy.

The defendant-appellee in the Southern District of Florida and in the Eleventh Circuit, and respondent in this Court, is Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A.

In the District Court for the District of Columbia, the D.C. Circuit, and the Southern District of Florida prior to the substitution of Beck, the defendant-appellee was the Federal Deposit Insurance Corporation, as receiver for Southeast Bank, N.A. (FDIC-Receiver). The FDIC-Receiver is no longer a party to this case and is not a respondent in this Court.

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BRIEF FOR PETITIONER

OPINIONS BELOW

This case began in the District Court for the District of Columbia. It was appealed to the D.C. Circuit, remanded to the district court, transferred to the Southern District of Florida, and eventually appealed to the Eleventh Circuit. This Court granted certiorari to review the decision of the Eleventh Circuit.

The District Court for the District of Columbia's opinion and order granting summary judgment to then-defendant FDIC-Receiver is published as *Murphy* v. *FDIC*, 829 F. Supp. 3 (D.D.C. 1993), and is reproduced as Appendix B to the Petition (pages B1-B11). The D.C. Circuit's decision reversing the district court is published as *Murphy* v. *FDIC*, 61 F.3d 34

(CADC 1995) ("*Murphy I*"), and is reproduced as Appendix C to the Petition (pages C1-C14). On remand, the D.C. District Court transferred the case to the Southern District of Florida. The transfer order is unpublished and is reproduced as Appendix D to the Petition (pages D1-D2). In May 1998, respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, N.A., was substituted as party defendant for the FDIC-Receiver. The substitution order is unpublished and is reproduced as Appendix E to the Petition (page E1). The District Court for the Southern District of Florida's opinion and order dismissing the complaint is unpublished and is reproduced as Appendix F to the Petition (pages F1-F6). The Eleventh Circuit's decision affirming the district court is published as *Murphy* v. *FDIC*, 208 F.3d 959 (CA11 2000) ("*Murphy II*"), and is reproduced as Appendix A to the Petition (pages A1-A18).[1]

JURISDICTION

The Eleventh Circuit entered its judgment on April 7, 2000. The petition for a writ of certiorari was filed on July 5, 2000, and granted on September 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal common-law *D'Oench* doctrine has been partially codified by 12 U.S.C. § 1823(e), as amended, and 12 U.S.C. § 1821(d)(9).[2] These provisions are reproduced as

[1] At respondent's insistence, the opinions of the Eleventh Circuit and the District Courts for the Southern District of Florida and the District of Columbia were again reproduced in the Joint Appendix. Citations in this brief will continue to refer to the Appendices to the Petition (Pet. App.).

[2] Section 1823(e) was amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989).

Appendix G to the Petition (pages G1-G2) and Appendix H to the Petition (page H1), respectively.

STATEMENT

1. The federal common-law rule at issue in this case is a mongrel descendant of the rule of equitable estoppel set out by this Court in *D'Oench, Duhme & Co., Inc.* v. *FDIC*, 315 U.S. 447 (1942). In *D'Oench*, the Federal Deposit Insurance Corporation acting in its corporate capacity (FDIC-Corporate) sued to recover on a note it had acquired in connection with payments it made from the insurance fund to facilitate the transfer of deposit liabilities from a failed bank to a healthy bank.[3] The maker of the note defended on the ground that the bank had agreed not to call the note, although no such agreement appeared in the bank's records.

Looking to a then-existing provision of the Federal Reserve Act criminalizing the false overvaluation of a security to influence any action by the FDIC-Corporate, this Court discerned a "federal policy to protect respondent, and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans." 315 U.S. at 457. In light of that policy, this Court held:

> Plainly one who gives such a note to a bank with a secret agreement that it will not be enforced must be presumed to know that it will conceal the truth from the

[3] There is a well-defined dichotomy between the FDIC acting in its corporate capacity and pursuing its own rights as a bank insurer (FDIC-Corporate) and the FDIC acting as a receiver of a failed bank asserting derivative rights on behalf of a bank's creditors and shareholders (FDIC-Receiver). See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994); *Atherton* v. *FDIC*, 519 U.S. 213, 225 (1997); *Gilman* v. *FDIC*, 660 F.2d 688, 690 (CA6 1981). The difference in these separate capacities is quite significant to this case, where respondent is asserting rights that, at best, are derivative from the FDIC-Receiver. See *infra* at 10-11, 13-14, 25-26.

> vigilant eyes of the bank examiners. * * * The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled.

Id. at 460. Because the maker of the note "was responsible for the creation of the false status of the note in the hands of the bank," the Court concluded that he was not allowed to plead the "secret agreement" leading to that false status as a defense. *Id.* at 461. Otherwise he "would be enabled to defeat the purpose of the statute by taking advantage of an undisclosed and fraudulent arrangement which the statute condemns and which the maker of the note made possible." *Id.*

In 1950, Congress substantially enacted the holding of *D'Oench* as part of a provision relating to purchase and assumption transactions by the FDIC-Corporate. See Federal Deposit Insurance Act of 1950, c. 967, 64 Stat. 873, 889 (Sept. 21, 1950), *codified at* 12 U.S.C. § 1823(e). That provision originally provided that "[n]o agreement which tends to diminish or defeat the right, title or interest of the Corporation [the FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement" satisfied four detailed conditions relating to writing, execution, approval, and recordation.

In 1989, as part of the comprehensive reforms adopted in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989), Congress amended 12 U.S.C. § 1823(e) both to expand and to make more precise the federal defense against certain unwritten agreements. FIRREA extended § 1823(e) to agreements tending to diminish or defeat the interest of the FDIC in any asset acquired by it "as receiver"; extended that section to the newly formed Resolution Trust

Corporation (RTC), 12 U.S.C. § 1441a(b)(4); and added comparable protection for "bridge banks," which are transitional entities created to facilitate purchase and assumption transactions, *id.* § 1821(n)(4)(I). FIRREA also added a new provision at 12 U.S.C. § 1821(d)(9)(A), which made § 1823(e) applicable to affirmative claims against the banking authority.

From 1950 to the present, this Court has never explicitly addressed whether the *D'Oench* case has continuing force as a common-law rule of decision separate from § 1823(e). And this Court has only once interpreted § 1823(e), in *Langley* v. *FDIC*, 484 U.S. 86 (1987), providing some indirect insight into the relationship between *D'Oench* and § 1823(e). See *infra* at 18-19. The lower federal courts, however, have taken the limited holding of the *D'Oench* case and run with it in a variety of occasionally conflicting directions. This case presents the question whether several aspects of the mutated *D'Oench* "doctrine" have any federal common-law existence independent of the terms of § 1823(e).

2. On August 18, 1989, petitioner Murphy invested over $500,000 in Orchid Island Associates Limited Partnership ("Orchid") as part of a development project for a golf and beach club in Florida.[4] Over a period of several years extending before and after this investment, Southeast Bank lent Orchid approximately $50 million for the project. Throughout this period Southeast Bank exercised extensive control and direction over the project making Southeast Bank a *de facto* joint venturer with Orchid. As a result of various wrongful activities by Southeast Bank and Orchid, Orchid eventually defaulted on its loans and Southeast Bank fore-

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[4] Unless otherwise noted, the facts are taken from the Eleventh Circuit's opinion, Pet. App. A, which are in turn taken from the allegations of petitioner's amended complaint, which must be accepted as true given the procedural posture of the case. Pet. App. A4.

closed on the property. In 1991, Southeast Bank was declared insolvent and placed into FDIC receivership.

In 1992, Murphy filed suit in the District Court for the District of Columbia against the FDIC as receiver for Southeast Bank. The complaint alleged that Southeast Bank's wrongful actions in concert with Orchid caused the loss of Murphy's investment. The complaint set forth claims for breach of fiduciary duty, breach of contract, accounting deficiencies, fraud, negligent misrepresentation, and securities violations.

The FDIC-Receiver moved to dismiss the complaint, arguing that Murphy's claims were barred by § 1823(e) and, independently, by the federal common-law *D'Oench* doctrine. In particular, the FDIC-Receiver asserted that the *D'Oench* doctrine barred Murphy's claims because liability depended upon the joint misdeeds of Southeast Bank and Orchid, but there was no written agreement memorializing their collusive wrongdoing as a formal "joint venture."

On August 10, 1993, the district court, treating the FDIC's motion as one for summary judgment, granted summary judgment on all counts. Pet. App. B1. The district court ruled that Murphy "cannot recover against Southeast on any theory of an alleged unwritten joint venture agreement pursuant to *D'Oench* * * * and 12 U.S.C. § 1823(e)." Pet. App. B4. Murphy appealed.

On August 1, 1995, the D.C. Circuit, per Judge Ginsburg for himself, Chief Judge Edwards, and then-Judge Wald, reversed. Pet. App. C1. The court held that § 1823(e) did not bar Murphy's claims because those claims did not relate to a specific "asset" acquired by the FDIC, Pet. App. C5, and that this Court's decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), "removes the federal common law *D'Oench* doctrine as a separate bar to such claims." Pet. App. C2. As part of a detailed analysis of this Court's *O'Melveny* decision, the D.C. Circuit quoted *O'Melveny*'s statement regarding the

"'extensive framework of FIRREA'" that "'[t]o create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.'" Pet. App. C10.

The D.C. Circuit then applied the reasoning of *O'Melveny* to the federal common-law *D'Oench* doctrine thus:

> [A]lthough the opinion for the Court does not specifically mention *D'Oench*, it does expressly include one of the *D'Oench*-like statutory provisions (§ 1821(d)(9)) in the list of special federal statutory rules of decision from which it infers that "*[i]nclusio unius, exclusio alterius*." *O'Melveny & Myers*, 512 U.S. at --, 114 S. Ct. at 2054. In so doing the Supreme Court, we think, necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute – of which the *D'Oench* doctrine is one.

Pet. App. C10-C11. The D.C. Circuit concluded that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' and that the district court erred in holding that Murphy's claims are barred under *D'Oench*." Pet. App. C13.

On remand to the district court, the FDIC-Receiver again moved to dismiss petitioner's (amended) complaint on state-law grounds. Motion to Dismiss, June 14, 1996.

On August 21, 1996, the district court, without ruling on the pending motion to dismiss, transferred the case, *sua sponte* and over Murphy's objections, to the Southern District of Florida. Pet. App. D1.

On May 7, 1998, the FDIC-Receiver moved to substitute respondent Jeffrey H. Beck, as Successor Agent for Southeast Bank, as the party defendant in the Southern District of Florida. Motion to Substitute Party Defendant, May 7, 1998. Beck had become the Successor Agent of Southeast Bank when, pursuant to 12 U.S.C. § 197, the FDIC-Receiver had

completed its receivership duties and called a meeting of the shareholders of Southeast Bank to elect an agent to wind up the Bank's affairs. After a series of intervening appointments, Beck – who was also the Chapter 7 trustee for Southeast Banking Corporation and sole shareholder of the Bank – elected himself as the Successor Agent. Motion to Substitute Party Defendant ¶¶ 3-5, at 1-2.

On May 11, 1998, respondent Beck, as Successor Agent for Southeast Bank, was substituted for the FDIC-Receiver as the party defendant. Pet. App. E1.

On July 27, 1998, the District Court for the Southern District of Florida granted the motion to dismiss pending from the District of Columbia. Pet. App. F1. The district court held, *inter alia*, that Murphy's claims were barred by the common-law *D'Oench* doctrine notwithstanding the D.C. Circuit's contrary prior decision in the case. Pet. App. F5-F6. Murphy again appealed.

On April 7, 2000, the Eleventh Circuit, relying exclusively on the common-law *D'Oench* doctrine, affirmed the district court's decision. Pet. App. A1.[5] The court initially rejected Murphy's arguments that the D.C. Circuit's prior decision should control based on either choice-of-law or law-of-the-case principles. Pet. App. A11-A12.

The Eleventh Circuit then held, in reliance on its prior circuit precedent, that the federal common-law *D'Oench* doctrine was good law notwithstanding related statutory provisions amended and added by FIRREA and notwithstanding this Court's decisions in *O'Melveny* and *Atherton*:

> In *Motorcity I* and *Motorcity II* [*Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity I*"), 83 F.3d 1317 (CA11 1996) (*en banc*), vacated and remanded *sub nom. Hess* v. *FDIC*, 519 U.S. 1087 (1997), reinstated, *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank N.A.*, ("*Motorcity II*"), 120 F.3d 1140 (CA11 1997) (*en banc*), cert. denied *sub nom. Hess* v. *FDIC*, 523 U.S. 1093 (1998)] we * * * * explained that both *O'Melveny* and *Atherton* dealt with the question of whether to create new federal common law in particular areas rather than with the question of whether Congress intended the FIRREA to supplant "the previously established and long-standing federal common law *D'Oench* doctrine." *Motorcity II*, 120 F.3d at 1143; *see also Motorcity I*, 83 F.3d at 1330.

Pet. App. A16-A17. The Eleventh Circuit also rejected Murphy's argument that the *D'Oench* doctrine was inapplicable where a receivership has generated a substantial profit ($150 million) and hence the only persons (inequitably) benefiting from application of the doctrine – and from Murphy's loss – were the Bank's shareholders rather than the FDIC. Pet. App. A13-A14. The court accordingly held that the *D'Oench* doctrine "remains good law" in the Eleventh Circuit and was applicable to this case. *Id.* A18.

Murphy timely petitioned for a writ of certiorari, which this Court granted on September 26, 2000.

SUMMARY OF ARGUMENT

1. Federal common law is a disfavored creature, limited to exceptional circumstances demanding a federal rule of decision but lacking a federal statute to provide one. This Court's decisions in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), and *Atherton* v. *FDIC*, 519 U.S. 213 (1997), establish the standards governing the availability off federal common law rules for the benefit off the FDIC acting in its capacity as a receiver of a failed financial institution. Those cases confirmed that the interests pursued by the FDIC-Receiver are not those of the United States, and thus do not create one of those "'few and restricted instances'" where

[5] The court expressly declined to reach two other grounds given by the district court for the dismissal. Pet. App. A18 n.8. Those other grounds, while in petitioner's view frivolous, would remain open on remand.

federal common law might be justified. *O'Melveny*, 512 U.S. at 87 (citation omitted); *Atherton*, 519 U.S. at 225. Those cases also established that FIRREA, by comprehensively addressing the rights of the FDIC-Receiver, left no room or justification for federal common law, but rather left unaddressed matters "subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85.

Under the approach and holdings of *O'Melveny* and *Atherton*, there is no valid federal common-law *D'Oench* doctrine applicable to this case. Any supposed federal interests of the FDIC-Receiver or its private successor in this case are no stronger than, and are in fact much weaker than, the interests rejected in *O'Melveny* and *Atherton*. The only interests at stake are the purely private interests of the Bank's shareholders. Even apart from FIRREA, therefore, the evolved federal common-law *D'Oench* doctrine invoked in this case is invalid. That conclusion is only confirmed by the 1989 enactment of FIRREA. The detailed provisions governing which parties and what claims are subject to the statute's *D'Oench*-like protections leave no room for federal common law. *Inclusio unius, exclusio alterius*.

2. There is no basis for avoiding the limitations of *O'Melveny* and *Atherton* in the supposed fact that they dealt with the creation of new federal rules rather than the displacement of old ones. Any supposed presumption that statutes do not intend to displace existing federal common law does not apply to federal common law that is invalid even aside from inferences drawn from subsequent congressional action. Furthermore, such a presumption does not displace the *O'Melveny* and *Atherton* analyses. Both of those cases relied upon earlier cases from this Court that had displaced pre-existing federal common law, and *Atherton* itself dealt with a common-law rule that had been applied by federal courts for over one hundred years. And as applied in this case, the evolved common-law rule invoked by respondent was neither longstanding nor well established when FIRREA

was adopted, hence no saving presumption would even apply. Finally, even applying a presumption of retention, that presumption is more than overcome given that FIRREA spoke directly to the issues addressed by the *D'Oench* doctrine.

ARGUMENT

I. THERE IS NO VALID FEDERAL COMMON LAW GOVERNING THE RIGHTS OF THE FDIC-RECEIVER OR ITS PRIVATE SUCCESSORS.

The decision below depends entirely upon the proposition that federal common law protects the FDIC-Receiver and, derivatively, its private successors, from claims related to unrecorded agreements. But such federal common law has never *validly* existed and, even if it had, it would not have survived the enactment of FIRREA in 1989.

A. *O'Melveny* and *Atherton* Govern Invocations of Federal Common Law by the FDIC-Receiver or Its Private Successors.

The basic principles controlling this case were set out by this Court in its unanimous decision in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). In prosecuting a state-law malpractice action, the FDIC-Receiver sought to rely on a federal common-law rule to bar a state-law estoppel defense based upon imputed knowledge of the alleged wrongdoing. Under alternative analyses, this Court rejected the FDIC-Receiver's invocation of federal common law.

Starting with the fundamental proposition – established in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), but apparently lost on the FDIC – that "'[t]here is no federal general common law,'" 512 U.S. at 83, this Court held that state law, "not federal law, governs the imputation of knowledge to corporate victims of alleged negligence." *Id.* at 84-85. Regarding the further question whether such imputed knowledge could be charged to the FDIC-Receiver, this Court again rejected the application of federal common law.

Noting the FDIC-Receiver's reliance on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), for the proposition that "federal law governs questions involving the rights of the United States arising under nationwide federal programs," the Court observed that the "FDIC is not the United States," and that, even if it were, the Court could not assume that the FDIC "was asserting its own rights rather than, as receiver, the rights of" the bank in receivership. 512 U.S. at 85. Nor did the case involve one of those "'few and restricted'" instances "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" 512 U.S. at 87 (quoting *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963); *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). "Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict." 512 U.S. at 87-88.

The rules at issue did "not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred," and there was not even "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity." *Id.* at 88. There was likewise no federal interest in avoiding the supposed depletion of the deposit insurance fund because "there is no federal policy that the fund should always win," and this Court had previously rejected similar "'more money' arguments." *Id.* This Court also disposed of the FDIC-Receiver's theory that application of state law would "'disserve the federal program,'" finding it a "facile approach to federal-common-law-making" that "demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.* at 89.

In addition to the generic assertion of federal interests, the FDIC-Receiver had claimed that FIRREA "positively authorized federal common law." *Id.* at 87. Not only did the

Court reject this contention, it held that FIRREA actually confirmed the absence of federal common law. Noting that 12 U.S.C. § 1821(d)(2)(A)(i) places the FDIC-Receiver into the shoes of the insured depository institution, the Court then held that those further "provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver" – notably including § 1821(d)(9) – "demolished" the argument that FIRREA demonstrated a "high federal interest" sufficient to justify use of federal common law. 512 U.S. at 86. The added rights expressly granted to the FDIC-Receiver, this Court ruled, can be neither "supplemented [nor] modified by federal common law. * * * *Inclusio unius, exclusio alterius*." *Id.* Referring to the "extensive framework of FIRREA," this Court stated that "[t]o create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 87. Instead of inviting federal common law, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Whether judged on the law either before or after FIRREA, the conclusion was the same: The FDIC-Receiver may not invoke federal common law to defeat claims or defenses involving the rights of a bank in receivership. *Id.* at 87.

Three years after *O'Melveny*, this Court again rejected the FDIC-Receiver's invocation of federal common law in *Atherton* v. *FDIC*, 519 U.S. 213 (1997). Regarding the applicable standard of care for officers and directors of a federally chartered savings association being sued by the FDIC-Receiver, this Court held that FIRREA set the minimum standard and rejected "a pre-existing judge-made federal common-law standard" invoked by the FDIC-Receiver to fill the space above that minimum standard. 519 U.S. at 225. Analyzing the validity of the asserted federal common-law standard – which had been created by this Court and applied by the lower courts for over 100 years – this Court held that *Erie* had eliminated the general basis for the rule and that the rule

did not fall within the otherwise exceedingly narrow category of valid federal common law. See generally 519 U.S. at 218-19 (reviewing *O'Melveny* and the cases considered therein, and concluding that application of state law did not create a sufficient conflict with or threat to federal interests such as might justify federal common law). In rejecting various alleged federal interests, the Court noted significantly that, as in *O'Melveny*, "the FDIC is acting only as receiver of a failed institution; it is not pursuing the interest of the Federal Government as a bank insurer." *Id.* at 225. Given that prior cases had declined to recognize federal common law where the asserted interests were "at least as strong as, if not stronger than, those present[ed]" by the FDIC-Receiver, the Court concluded that there "is no federal common law that would create a general standard of care applicable to this case." 519 U.S. at 226.

O'Melveny and *Atherton* set the standard for analyzing efforts by the FDIC-Receiver to invoke federal common law. Applying those standards to this case, there still "is no federal common law" that applies for the benefit of either the FDIC-Receiver or respondent as its private successor.

B. The *D'Oench* Doctrine Is Invalid As Applied To the FDIC-Receiver or Its Private Successors.

As in *O'Melveny* and *Atherton*, the first question to consider here is whether, aside from FIRREA, there even validly exists a federal common-law rule of decision applicable to respondent as the private successor to the FDIC-Receiver. Thereafter, this Court would consider whether FIRREA had any further implications concerning the existence or validity of any federal common-law rule that might govern this case.

No Federal Interest Justifying Federal Common Law. There is nothing exceptional about claims against the estate of a bank in receivership or thereafter that implicates a federal interest sufficient to draw the federal courts into the task of lawmaking. Even when the FDIC-Receiver was still a party

to this case, there was no question that it was "acting only as a receiver of a failed institution" and was "not pursuing the interest of the Federal Government as a bank insurer." *Atherton*, 519 U.S. at 225; see *O'Melveny*, 512 U.S. at 85. And as the case came to the Southern District of Florida and the Eleventh Circuit, even the FDIC-Receiver had left the scene, having completed its duties and, pursuant to 12 U.S.C. § 197, returned the substantial remaining estate of Southeast Bank to respondent as the Successor Agent elected by and acting for the benefit of the shareholders. While even the direct involvement of the FDIC-Receiver is insufficient to support a federal common-law rule, the current dispute affects only the shareholders of the Bank and petitioner Murphy, and does not even remotely implicate significant federal interests. Neither a need for uniformity, nor the deposit insurance fund, nor the proper operation of a federal program is in any way affected by the competing private claims in this case. And assertions of such effects would be inadequate in any event, as both *Atherton* and *O'Melveny* have established in contexts far more compelling than this case. *Atherton*, 519 U.S. at 219-20; *O'Melveny*, 512 U.S. at 88.

The Eleventh Circuit made no effort to identify federal interests or to analyze the validity of the *D'Oench* doctrine as applied in this case. Instead it merely cited to its prior decisions in *Motorcity I* and *Motorcity II* for the overly broad claim that the *D'Oench* doctrine constituted "'previously established and long-standing federal common law.'" Pet. App. A16 (quoting *Motorcity II*, 120 F.3d at 1143). But the age of the initial *D'Oench* case – the holding of which is limited to defenses against collection on assets held by the FDIC-Corporate and hence does not apply here – is beside the point and establishes neither the age nor the legitimacy of its overreaching offspring, the *D'Oench* doctrine as applied by the courts below. And even in the *Motorcity* opinions, the Eleventh Circuit offered nothing remotely resembling a significant federal interest that would be applicable to this case. Rather,

it asserted that the *D'Oench* case itself involved a "'uniquely federal interest[],'" expanded its assertion to claim that "the previously-established federal common-law *D'Oench* doctrine * * * operates in an area of special federal concern as recognized by Congress, the Supreme Court, and the lower federal courts," and thus concluded that the "*O'Melveny* analysis does not apply." *Motorcity I*, 83 F.3d at 1328, 1330. Despite these bold assertions, the nature of any significant federal interest beyond the confines of the original *D'Oench* case, much less beyond the scope of the specific statutory provisions, remains a mystery. Having thus blinked the issue of the validity apart from FIRREA of the *evolved D'Oench* doctrine, the Eleventh Circuit then dismissed the impact of FIRREA by applying a presumption favoring the retention of such common law. *Id.*

After *Motorcity I* was vacated and remanded by this Court for reconsideration in light of *Atherton*, the Eleventh Circuit again misconceived the issue of whether the *D'Oench* doctrine was a valid application of federal common law, focusing instead on the fact that the initial *D'Oench* case post-dated this Court's decision in *Erie*. *Motorcity II*, 120 F.3d at 1143. But once again, the court's approach to federal common law was too "facile." *O'Melveny*, 512 U.S. at 89. Petitioner seriously doubts whether even the narrow *D'Oench* case raised interests sufficient to justify federal common law under current standards, much less survived as federal common law in light of its 1950 codification. But even if it did, that does not answer whether its wayward *extensions*, never endorsed by this Court, are valid. No interest identified by the Eleventh Circuit justifies those extensions and the displacement of state law beyond the scope of the 1950 statute and the original *D'Oench* case.[6]

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[6] Petitioner believes that the *D'Oench* case itself was preempted by the 1950 statute, which spoke directly and comprehensively to the issue originally addressed by this Court. While *D'Oench* is certainly relevant to inform courts as to the meaning of the statutory terms adopted in 1950, see *Langley* v. *FDIC*, 484 U.S. 86, 92-93 (1987), there is no indication that it carries further force beyond the language of the statute. This Court need not reach the viability of the *D'Oench* case itself, which does not apply to the facts here. But if it elects to reach that logically prior issue, the 1950 demise of the narrower *D'Oench* case *a fortiori* would invalidate the subsequent expansion of the doctrine by the lower federal courts in precisely the same manner as in *Atherton* the invalidity, after *Erie*, of the earlier *Briggs* case eliminated all subsequent applications of that line of federal common law in the lower federal courts.

Furthermore, even the basic interests underlying *D'Oench* itself do not support the rule asserted in this case. There is no credible suggestion that petitioner "lent himself" to the secret agreement between Southeast Bank and Orchid, *D'Oench*, 315 U.S. at 460, or that he was in any position to have insisted that such agreement be put in writing. Petitioner was the victim of, not a participant in, the collusive behavior in this case. Conspirators generally do not reduce their conspiracy to writing, and their victims can hardly demand otherwise. The interest in *D'Oench* of encouraging written agreements and deterring secret ones thus has no application here. If anything, disallowing the type of claim in this case has the exact opposite effect, encouraging such collusion by reducing the consequences. Whatever the merits of the alleged interests in *D'Oench* itself, they are not implicated here, and consequently "the *scope* of judicial displacement of state rules" falls well short of this case. *O'Melveny*, 512 U.S. at 87 (emphasis added).

The extremely limited circumstances justifying the application of federal common law simply do not exist, and have never existed, under the circumstances presented by this case. As this Court has noted, "absent some congressional authorization to formulate substantive rules of decision, federal common law exists *only* in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and

admiralty cases." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).[7] This case involves none of those limited areas and hence there is no federal common law to be applied.

FIRREA Negates Any Possible Federal Common Law. The detailed provisions of FIRREA both confirm the absence of federal common law to begin with and would in any event negate any existing federal common law. While not address-

[7] Petitioners believe that the quoted statement from *Texas Industries* should be the outer limits of federal common law. Both *O'Melveny* and *Atherton*, however, use language suggesting a further, though extremely narrow, policy-based justification for federal common law. *O'Melveny*, 512 U.S. at 88 (discussing absence of any "significant conflict with an identifiable federal policy or interest"); *Atherton*, 519 U.S. at 218 (discussing conflict with federal policy as narrow potential basis for common law). Such independent judicial promotion of supposed federal policy goals (at the expense of state law) is troubling at a minimum, *O'Melveny*, 512 U.S. at 89, and raises difficult separation-of-powers and federalism problems. Indeed, even where directed by Congress, the exercise by the judiciary of such derivative authority, other than in certain traditionally judicial realms such as sentencing or remedies, could raise concern under the nondelegation doctrine. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 390-91 (1989) (discussing the "role that the Judiciary always has played, and continues to play, in sentencing"); *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992) ("[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court"). The doctrine of constitutional doubt thus should weigh against construing a federal statute as authorizing judicial lawmaking without an express affirmative indication of such authorization, and should preclude the finding of such authorization based upon mere inference. Where the operative provisions of a statute do not go as far as some aspirational policy statement or legislative history might otherwise have suggested they go, that merely demonstrates the presence of competing, though perhaps unspoken, policy concerns that constrain the more flowery aspirations. Legislative compromise and other checks often temper the full implementation of sweeping principles or policies. Federal courts have no constitutional authority to tinker with the legislative results merely because, among the competing interests at stake, some supposedly preferred interest might be better served by doing so.

ing *D'Oench* by name, the use of § 1821(d)(9) as the basis for its application of the "*inclusio unius, exclusio alterius*" principle more than covers that ground.[8] Furthermore, FIRREA was quite detailed regarding to whom and how far its *D'Oench*-like protections would extend. For example, FIRREA extended the previous statutory protections to the FDIC-Receiver, the RTC, and bridge banks, and extended the coverage, at least for the FDIC, to certain affirmative claims. See 12 U.S.C. §§ 1823(e), 1441a(b)(4), 1821(n)(4)(I), 1821(d)(9). This detailed legislative treatment of the effectiveness of unwritten agreements suggests that Congress extended protection to such parties and such claims as it thought proper, and declined to go further. Allowing federal common law to proceed where Congress has chosen to stop "is not to 'supplement' this scheme, but to alter it." *O'Melveny*, 512 U.S. at 87.

The preemptive inferences from FIRREA are further supported by this Court's pre-FIRREA decision in *Langley* v. *FDIC*. Interpreting the word "agreement" in the 1950 version of § 1823(e), this Court looked to the *D'Oench* case, but only as "the leading case in this area prior to enactment of § 1823(e) in 1950." 484 U.S. at 92. *D'Oench* was used exclusively as support for and confirmation of the otherwise permissible meaning of the word "agreement," and there was no suggestion that either *D'Oench* or its progeny could extend any protection beyond the statutory terms themselves. That the Court viewed the statute as the final word in the area, to the seeming exclusion of federal common law, can be seen toward the end of the opinion, where it stated:

> The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). *An agreement that meets them prevails* even if the FDIC did

[8] And, as the D.C. Circuit noted in *Murphy I*, this "Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine." Pet. App. C10.

> not know of it; and an agreement that does not meet them fails even if the FDIC knew. *It would be rewriting the statute to hold otherwise.*

Id. at 95 (emphasis added). This passage, anticipating virtually identical sentiments in *O'Melveny*, suggests that the federal common-law *D'Oench* doctrine did not separately survive even its 1950 codification. With this case fresh in its memory, Congress made detailed revisions and additions to that codification, thus more certainly defining its choices, and leaving still less room for any supposed federal common law.

Further (though perhaps unintentional) corroboration that FIRREA shut the door on any putative federal common law comes from the behavior of the FDIC-Receiver itself, which suggests that in the wake of FIRREA there is not even a colorable federal interest in a continued common-law supplement. As the FDIC-Receiver has argued to this Court in opposition to petitions for certiorari, it has adopted a policy under which it claims it will not invoke the common-law *D'Oench* doctrine as to any transaction arising after FIRREA's enactment. *See* Br. for the FDIC in Opp. at 6-7, *Noel* v. *FDIC*, No. 99-655 (*cert. denied*, -- U.S. --, 120 S. Ct. 935 (2000)) (claiming that the FDIC will assert *D'Oench* only as to transactions preceding the August 9, 1989, enactment of FIRREA); Br. for the FDIC in Opp. at 10, *Hess* v. *FDIC*, No. 97-1025 (*cert. denied*, 523 U.S. 1093 (1998)) (same).[9] It is hardly credible for private parties such as respondent here to claim an overriding federal interest when its predecessor, the FDIC-Receiver, feels no such interest in or need for federal common law.

Under the controlling principles of *O'Melveny* and *Atherton*, there simply does not exist any valid federal common

[9] Policy Statement Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997).

law that applies in this case. The progeny of the *D'Oench* case were not, and certainly are not now, good law.

II. THERE IS NO BASIS FOR AVOIDING THE RULE OF *O'MELVENY* AND *ATHERTON*.

The Eleventh Circuit disregarded *O'Melveny* and *Atherton* by claiming that those cases dealt only with the creation of *new* federal common law, but did not apply to pre-existing federal common law. It then argued that FIRREA did not displace the common-law *D'Oench* doctrine because statutes that invade the common law are presumed to leave long-established principles intact absent an evident purpose to the contrary, citing *United States* v. *Texas*, 507 U.S. 529, 534 (1993). But the general policy favoring preservation of the common law does not alter the application of *O'Melveny* or *Atherton* in this case.

First, invalid federal common law is not presumed to be preserved by congressional action. Second, *O'Melveny*, *Atherton*, and their precursors apply to pre-existing as well as newly minted federal common law. And any favorable presumption applicable to federal common law is far weaker for policy-based applications of federal common law than it is for core federal common law involving the rights of the United States, disputes between states, or admiralty. Third, the mutations of the *D'Oench* doctrine invoked in this case were neither longstanding nor well established in 1989, hence they do not trigger any presumption of retention. Fourth, even assuming that Congress must have spoken directly to the issues in order to overcome any applicable presumption, it has. Congress in FIRREA directly addressed the effectiveness of parole agreements, and consequently displaced any federal common law, whether old or new.

A. Invalid Federal Common Law Is Not Presumed Retained, Regardless of Its Age.

In holding that FIRREA did not displace the supposed common law asserted in this case, the Eleventh Circuit merely

assumed the validity of the mutated *D'Oench* doctrine based on the age of the *D'Oench* case, and then cited to its prior decisions in *Motorcity I* and *Motorcity II*. Pet App. A16-A17. But as both *O'Melveny* and *Atherton* teach, the valid scope of any federal common law is not to be assumed. And as the previous section illustrated, any extension of the *D'Oench* doctrine to this case – involving an affirmative claim, unrelated to any asset of the Bank, defended first by the FDIC-Receiver and now by a private successor agent – is not valid regardless of the age or validity of the more limited *D'Oench* case itself. As in *Atherton*, invalid federal common law, even if old, is not available to fill any space left open by FIRREA. Such space is to be filled by state law. *Atherton*, 519 U.S. at 218.

B. *O'Melveny* and *Atherton* Both Apply To Pre-Existing Federal Common Law.

The analyses in *O'Melveny* and *Atherton* were not limited to whether federal common law should be newly created as opposed to retained from some prior existence. While *O'Melveny* arguably involved a request for a "new" rule, it nonetheless relied upon cases finding displacement of pre-existing federal common law. See *O'Melveny*, 512 U.S. at 85 (citing *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981); *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981)).

Thus, in *Milwaukee* v. *Illinois*, this Court stated that "when Congress addresses a question *previously governed by a decision rested on federal common law* the need for such an unusual exercise of lawmaking by federal courts disappears. * * * [The Court's] commitment to the separation of powers is too fundamental to *continue* to rely on federal common law * * * when Congress has addressed the problem." 451 U.S. at 314-15 (emphasis added and internal quotations omitted); see also *Northwest Airlines*, 451 U.S. at 84 nn.10 & 11 (discussing weight of authority in the lower federal courts supporting the federal common-law right of a contribution ultimately re-

jected by the Court). There is simply no basis for asserting that *Texas* somehow represents a departure from this long line of cases and thereby renders *O'Melveny* inapplicable.

In *Atherton*, the federal common-law rule being pressed by the FDIC-Receiver was over 100 years old, and even though it was created by this Court before *Erie*, the lower courts had continued to apply it throughout the remainder of the century. 519 U.S. at 220 (citing subsequent cases applying *Briggs*); *FDIC* v. *Mason*, 115 F.2d 548, 551-52 (CA3 1940); see also R. Stevens & B. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions: It's Gross Negligence Regardless of Whether Section 1821(k) Preempts Federal Common Law*, 13 Ann. Rev. Banking L. 169, 173-74 (1994) ("Before the adoption of FIRREA, a consensus existed among federal courts that * * * federal law alone governed * * * the issue of officers' and directors' liability" for federally chartered S&Ls). Again, there was no suggestion that such post-*Erie* application of federal common law in the lower courts somehow raised the bar for displacement or otherwise voided the *O'Melveny* analysis.[10]

Furthermore, it is highly doubtful that *Texas* established a standard in any way different from its predecessors, many of which were cited in both *O'Melveny* and *Atherton*. Thus, the "speaks[s] directly" test set forth in *Texas*, 507 U.S. at 534, is the virtually identical verbal formulation set out in numerous

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[10] It is no answer to *Atherton* to say that the original *Briggs* decision at issue was itself invalid after *Erie* whereas the *D'Oench* decision came after *Erie* and remains good law. The original *D'Oench* decision does not apply to this case, and probably did not independently survive its codification in 1950, when that case was still a pup. See *supra* at 4, 15-16 n.6. As for any subsequent evolution of the *D'Oench* doctrine in the lower courts since 1950, this Court has never endorsed such developments, they are no different than the post-*Erie* applications of the *Briggs* rule at issue in *Atherton*, and they are not entitled to any presumption of validity or preservation without much more.

prior cases. See *Milwaukee* v. *Illinois*, 451 U.S. at 315 ("the question [in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)] was whether the legislative scheme 'spoke directly to a question' – in that case the question of damages – not whether Congress had affirmatively proscribed the use of federal common law"); *Northwest Airlines*, 451 U.S. at 95 n.34 ("once Congress addresses a subject, even a subject previously governed by federal common law * * * the task of the federal courts is to interpret and apply statutory law, not to create common law"); *Mobil Oil*, 436 U.S. at 625 (courts may not supplement a statute when an Act "does speak directly to a question"). This Court in *O'Melveny* cited those cases using the same language, and hence it is simply wrong to suggest that a different standard should now apply merely because it did not also cite the *Texas* case. Compare *O'Melveny*, 512 U.S. at 85 (citing *Northwest Airlines* and *Milwaukee*) with *Texas*, 507 U.S. at 534 (citing *Mobil Oil* and *Milwaukee* for the "speak directly" formula).[11]

Finally, any presumption as applied to federal common law is of limited utility in cases such as this one, where there is considerable existing state law to consider as well, and hence presumptions regarding displacement or preservation will tend to cut both ways. As this Court has noted, "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis*, 384 U.S. at 68 (citation and quotation marks omitted). Outside of the core areas of federal

[11] Insofar as there may be a perceived difference in the rigor of the analysis in *Texas* as opposed to some other cases, such a difference can be explained by the fact that the common-law rule at stake in *Texas* went to the very heart of federal common law, involving the rights of the United States itself as against the several States. Furthermore, the preemptive inference would have led to extremely unusual results in *Texas* that were not to be lightly reached. Neither circumstance is present here, and hence there is no basis for applying any supposedly greater vigor in an effort to preserve a federal common-law rule regarding private rights where Congress has legislated on the issue at length.

common law where one would be hard pressed to find properly applicable state law, policy-based federal common law typically acts precisely to displace otherwise applicable state law. To read a statute as preserving federal common law thus necessarily reads it as allowing the displacement of state law.[12] Such a reading should be disfavored because the presumption in favor of preserving state law from federal displacement is considerably stronger than any presumption applicable to federal common law.

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" * * * [I]n cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Milwaukee, 451 U.S. at 316-17 (citation omitted); see also *Texas*, 507 U.S. at 534 ("a different standard applies when analyzing the effect of federal legislation on state law" than in the case of federal common law). Indeed, "the very concerns about displacing state law which counsel against finding pre-emption of state law in the absence of clear intent actually suggest a willingness to find congressional displacement of federal common law." *Milwaukee*, 451 U.S. at 317 n.9.

[12] In this case, for example, applying a federal common-law rule would displace state law rules regarding what establishes a *de facto* joint venture (or conspiracy), vicarious liability between such venturers, and the use of parole evidence to demonstrate concerted action and liability to third parties injured thereby. *Bryce* v. *Bull*, 143 So. 409, 411-12 (Fla. 1932); *Florida Tomato Packers, Inc.* v. *Wilson*, 296 So. 2d 536, 539-40 (Fla. Dist. Ct. App. 1974), *cert. denied*, 327 So.2d 32 (Fla. 1976).

Whatever the presumption concerning federal common law in areas where state law has nothing to say, that presumption is either weakened or non-existent where federal common law would displace state law. This is just such a case.

C. The Common-Law Rules Asserted in This Case Are Neither Longstanding Nor Well Established.

Even assuming, *arguendo*, that the difference between *Texas* and *O'Melveny* turns on the age and familiarity of the common-law rule in question, the rule being asserted in this case was neither aged nor familiar in 1989 when FIRREA was enacted. While the original *D'Oench* decision – applicable to the FDIC-Corporate and limited in a variety of ways – is indeed long in the tooth, the many new extensions of the *D'Oench* doctrine applied in this case lack the common-law credentials of the original decision.[13]

For example, the first time a court of appeals seems to have squarely confronted and ruled upon whether the *D'Oench* doctrine should be extended to the FDIC-Receiver was not until 1978; over thirty-five years after the original *D'Oench* case. See *FDIC* v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (CA9 1978) (rejecting the argument that the *D'Oench* doctrine does not apply to the FDIC-Receiver). Compare *FDIC* v. *Meo*, 505 F.2d 790, 793 (CA9 1974) (suggesting that *D'Oench* does not apply to the FDIC-Receiver). And the issue remained quite unsettled prior to and even after FIRREA, with various courts finding that the FDIC-Receiver remained subject to state law. See *FDIC* v. *British-Am. Corp.*, 744 F. Supp. 116, 119 (E.D.N.C. 1990) (noting that prior to 1989 amendment, protection of *D'Oench* doctrine "not available when the FDIC appears as receiver for the failed bank"); *In re Jeter*, 48 B.R. 404, 410 (Bankr. N.D. Tex. 1985) ("FDIC, as receiver of a national bank, is simply a successor in interest of the bank and takes title to the bank's claims against its debtors subject to all defenses which are good against the bank."); see also *In re Anjopa Paper & Bd. Mfg. Co.*, 269 F. Supp. 241, 253 (S.D.N.Y. 1967) ("Generally, the receiver of a national bank takes title to the bank's claims against its debtors subject to all the existing rights and equities."); *Trigo* v. *FDIC*, 847 F.2d 1499, 1503 n.4 (CA11 1988) ("While federal law controls the rights and liabilities of the FDIC-Corp., state law controls the FDIC when the agency is acting as receiver of a failed bank."). Though later cases also went the other way, see *FSLIC* v. *Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1277 & n.15 (CA11 1989) (holding, shortly after FIRREA, that *D'Oench* doctrine protects the FDIC-Receiver, and rejecting *Trigo* as dicta), there was no uniform view and this Court had never resolved the issue.

In similar fashion, the further extension of the *D'Oench* doctrine to private successors of the FDIC does not seem to have been decided in the courts of appeal until December 1989 – *after* the enactment of FIRREA in August of that year. See *FDIC v. Newhart*, 892 F.2d 47, 49 (CA8 1989) (applying *D'Oench* to purchaser of notes from FDIC-Corporate, though seemingly based upon state law grounds). And the Eighth Circuit in that case described the unpublished district court cases that had previously reached the same result as "essentially assertions without detailed reasoning, so as to have no persuasive force." *Id.* at 50 n.3. Such a ringing non-endorsement of the pre-FIRREA state of the federal common-law rule being invoked in this case shows that such law was neither longstanding nor well established.

The extension of the *D'Oench* doctrine to affirmative claims, as opposed to defenses against asset collection, also was a more recent development. See *Beighley* v. *FDIC*, 676 F. Supp. 130, 132 (N.D. Tex. 1987) (in a § 1823(e) case, holding that to "allow a claim against the FDIC asserting the very grounds that could not be used as a defense to a claim by the FDIC is to let technicality stand in the way of principle."),

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[13] And even the *D'Oench* case itself could claim no great age in 1950 when § 1823(e) was first enacted, and hence any presumption against displacement of that narrower common-law rule would not have applied.

on reh'g, 679 F. Supp. 625 (N.D. Tex. 1988), *aff'd*, 868 F.2d 776 (CA5 1989). And even so, the extension seems primarily to have been a means to prevent circumvention of the rule as applied to asset collection: Allowing a defendant in a collection suit merely to rename a contractual defense as a counterclaim for breach of contract would indeed have been troubling. But that "asset"-based approach does not establish the acceptance or longevity of a common-law rule barring no-asset affirmative claims such as those raised by petitioner.[14]

The uncertain legal terrain in 1989 rebuts any notion that the common-law rules invoked here could escape displacement by FIRREA. "Before we can apply this reluctance to infer legislative abrogations of the common law, however, we must determine what that terrain was – or at least how it might have been perceived – when Congress acted; Congress cannot think it necessary, and we should not expect it, to state clearly an intent to abrogate a common-law rule that does not exist." *Texas*, 507 U.S. at 541 (Stevens, J., dissenting).

But even apart from any uncertainty, the most salient feature of the evolved common-law rules applied in this case is the absence of any support from this Court for those multifarious extensions of the original *D'Oench* case. Petitioner submits that the proper measure of whether a federal common-law principle is sufficiently well established to receive any favorable presumption should turn not on the occasional rulings of the lower federal courts, but rather upon the consistent rulings of *this* Court. Cf. *Astoria Fed. Sav. & Loan Ass'n.* v. *Solimino*, 501 U.S. 104, 108 (1991) (supporting the notion that preclusion rules are "well established" by citing Supreme Court cases spanning a period of almost forty years); *Texas*, 507 U.S. at 533 (citing three Supreme Court

[14] There is a tremendous difference between blocking the collection of an asset of the receivership, thus reducing the estate, and pursuing a successful no-asset claim, which simply puts the claimant in line with the other creditors awaiting a share of whatever assets will remain after higher priority recipients are paid.

cases dating back as many as fifty years as the basis for the longstanding common-law rule that was preserved). In the present case, there is not a single ruling of this Court that would support the extension of *D'Oench* to the facts of petitioner's claim. Absent such a ruling, the common law invoked by respondent cannot be viewed as well established and cannot qualify for an inference that would overcome the authority of *O'Melveny* and *Atherton*.

D. Any Requirement That a Statute Speak Directly To the Issue In Order To Preempt the Evolved *D'Oench* Doctrine Is Amply Satisfied.

As a final matter, even under the "speaks directly" test invoked by respondent and the Eleventh Circuit, both the 1950 Act and FIRREA satisfy that test. The issue to which a statute must directly speak is the general one regarding the effectiveness of oral agreements, not the presence or absence of federal common-law authority. *Milwaukee*, 451 U.S. at 315.

Here, there is no serious question that the 1950 Act spoke directly to the subject covered by the *D'Oench* case, and effectively codified the rule of that case. See *Langley*, 484 U.S. at 92. FIRREA likewise spoke quite specifically to the issue of which parties were entitled to the bar against reliance on unrecorded agreements and what claims or defenses would be subject to that bar. See *supra* at 18.[15]

Furthermore, there is no doubt that Congress may "speak directly" to an issue via the *inclusio unius, exclusio alterius*

[15] The Eleventh Circuit's search for something more to demonstrate a specific congressional intent to abrogate federal common law, see *Motorcity II*, 120 F.3d at 1144 n.6, simply ignores this Court's opinion in *Milwaukee*, which rejected any such requirement and noted that federal law was preempted where Congress addressed the general issue. 451 U.S. at 315 (discussing *Mobil Oil*). Requiring further specificity in the "issue" required to be addressed by Congress in order to displace federal common law would do violence to the separation-of-powers principles that restrain the creation of federal common law to begin with.

principle, as evidenced by this Court's decision in *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), a case squarely relied upon in the later *Texas* case. *Texas*, 507 U.S. at 534. In *Isbrandtsen*, this Court held that despite "several early lower court decisions which allowed a set-off against a seaman's suit for wages," subsequent "legislation passed by Congress for the protection of seamen, beginning in 1872, has now covered this field." 343 U.S. at 781. It reached this conclusion because, while not mentioning set-offs in the statute,

> Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively.

Id. at 789; see also *Astoria Fed.*, 501 U.S. at 110 (statute "carries an implication that the federal courts should recognize no preclusion," previously recognized in federal common law). Of course, *O'Melveny* engaged in precisely such *inclusio unius, exclusio alterius* analysis, and cited the statutory codification of the *D'Oench* doctrine as an example of why a largely *separate* defense was excluded. *O'Melveny*, 512 U.S. at 86-87. Where the alleged common-law defense at issue is substantially the same as the statutory defense, the inference of exclusion is orders of magnitude stronger and more than sufficient to satisfy the "speaks directly" test. The *O'Melveny* analysis is thus fully consistent with *Texas* and its predecessors and dispositive of the present case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings.

Respectfully submitted,

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